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OF COURAGE, TUMULT, AND THE SMASH MOUTH TRUTH: A UNION SIDE APOLOGIA

*Michael C. Duff**

The most effective prerequisite for preventing struggle, the exact knowledge of the comparative strength of the two parties, is very often attainable only by the actual fighting out of the conflict.¹

INTRODUCTION

For as long as I can recall, I have ruminated over the subject of Julius Getman's recent book, *Restoring the Power of Unions: It Takes a Movement*.² My starkest meditations have arisen primarily not in the context of academic writing or teaching – my present work – but in the course of my prior work, first as a blue-collar worker and union organizer in the airline industry, and then in my two roles as a union side lawyer and National Labor Relations Board (NLRB) attorney. The interplay between my present and former work has served both as a rich source of material about which to write and a funder of periodic cognitive dissonance.³ This somewhat ethnographic essay represents, in part, a personal attempt to reconcile dissonant features of that interplay, making grateful use of Professor Getman's provocative book as its springboard. In essence, the project reflects upon my former “lifeworld,” to borrow the term of Habermas.⁴ I do this with a fair degree of trepidation for, as Habermas has explained, “to make lifeworld assumptions fully reflective—to speak of them explicitly—is already to destroy them.”⁵ And, of course, I cannot

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¹ James B. Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO STATE L. J. 751, 808 (1973)

² JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* (2010) [hereinafter “RESTORING POWER”]

³ For an elegant exposition of “the dissonance between the meaning of our national labor law, as decreed primarily by federal judges, and the social and economic realities of workplace relationships addressed by that law . . .” see James J. Brudney, *Of Labor Law and Dissonance*, 30 CONN. L. REV. 1353 (1998).

⁴ Christopher H. Johnson, *Lifeworld, System, and Communicative Action in RETHINKING LABOR HISTORY* 57 (University of Illinois, Lenard R. Berlenstein, ed.) (defining lifeworld as “the lived day-to-day human experience of communicative interaction.”).

⁵ Arthur W. Frank, *Habermas Notes*, available at <http://people.ucalgary.ca/~frank/habermas.html> (last visited December 7, 2010)

know all of the implications of such destruction. Throwing caution to the wind, I attempt to articulate my understanding of the smash mouth truth of labor conflict.⁶

Some personal biography in advance of this discussion may be in order. I set out in the world of work in my teen years while residing in a working-class suburb of Philadelphia during the waning days of the Carter Administration. After being overworked and underpaid in odd jobs for a few years throughout the early portion of the Reagan era, I realized, as did many of my working class contemporaries, that without resources to attend college only a union job was likely to provide any semblance of a living. Unskilled, or even semi-skilled, non-union jobs did not lead anywhere I wanted to go, a verity underscored again and again as I worked at tasks like washing dishes, mopping floors, cooking in fast food restaurants, and doing "over short and damaged" claim work in the air freight industry.

These early experiences nevertheless introduced me to a variety of workplaces and to the workers living their lives within them. Later jobs and careers broadened my diverse exposure to work. I labored as a unionized airline ramp worker; a union shop steward and organizer of airline ramp workers; a public and private sector labor lawyer; and a law professor focusing on labor and employment law. My somewhat unusual work history has emphasized, on a personal level, the extent of the chasm between flesh and blood workers and labor experts' ideation concerning them.⁷ Professor Getman's most recent book refreshingly eschews superficial analysis and puts some flesh and blood back on the bones of "the labor question," revealing voices, thoughts, and emotions of actual workers

⁶ A fan of American football may recognize the term "smash mouth" as a conceptual construct of former professional football coach Mike Ditka. "Smash mouth football" is stripped of pretense. A team wins through raw and often brutal physical superiority over its adversary.

⁷ Professor Getman has elsewhere written:

Few judges, Labor Board members, or academic commentators come from working class backgrounds, and those that do have been through the transformative experiences of law school, judicial clerking, and high level legal practice. Almost nothing in the professional experiences of lawyers and judges is likely to give them understanding of the practical consequences of legal decisions defining the rights of workers or unions.

Julius Getman, *Of Labor and Birdsong*, 30 CONN. L. REV. 1345, 1349 (1998)

Whether legal experiences have transformed me is for others to assess. I like to think I am a counterexample. Perhaps I am being conveniently delusional.

and union organizers.⁸ I approve of the method, for I think that the nature of union organizing is most powerfully revealed in its immediate human aspect. Yet the approach of labor law writ large often obscures human sentiment. While the excessive abstraction of law may be a criticism not unique to labor law,⁹ it feels odd in the context of the NLRA, a statute upheld as constitutional in large part because of its potential for maintaining industrial peace and diminishing industrial strife,¹⁰ considerations inescapably tied to pathos.

Perhaps intellectual detachment from workers, the subjects of labor law, is desirable or necessary on the plane of policy formulation. Nevertheless, the tactical method of the Act consists unflinchingly of attempts to eliminate employer practices “reasonably tending to interfere with, restrain, and coerce employees” in the exercise of statutory rights.¹¹ Under this statutory formulation, enforcement is unavoidably caught up in assessments of quasi-psychological impacts on workers. The National Labor Relations Board (NLRB) considers routinely conduct alleged to be unlawful and repeatedly makes judgments as to the effect of the conduct on workers. As Professor Getman has observed, the NLRB pursues this mission without ever really explaining the source of its administrative expertise in what amounts to subtleties of mass psychology.¹² The circuit courts, for their part, not too persuasively uphold or overturn NLRB decisions. The courts' explanations of their refusal to defer to agency expertise or their allowance of agency departures from precedent remain unsatisfactory.¹³ The machinations are in any event far removed from the day-to-day reality of ordinary workers.

Implicit in the foregoing critique is the proposition that, if one wishes to engage in meaningful discussion of restoring union power or reinvigorating the labor movement, the conversation must be joined at the level of the worker. Union density is, at bottom, a function of individual

⁸ See, e.g., RESTORING POWER at 126-27 (describing in union organizers' own words conversations with workers during organizing drives)

⁹ William Lucy, *Abstraction and the Rule of Law*, 29 Oxford Journal of Legal Studies 481, 508 (2009) (arguing that law's abstract judgment stands in need of justification because the moral merits of such abstract judgment are not immediately apparent).

¹⁰ See, e.g., *N.L.R.B. v. MacKay Radio*, 304 U.S. 333 (1938)

¹¹ See, e.g., *Empire State Weeklies*, 354 N.L.R.B. No. 91, slip op. at 2 (2009)

¹² Indeed, as Professor Getman points out, the NLRB has steadfastly refused to consider empirical evidence as to whether particular conduct has had actual coercive impact on employees. GETMAN, RESTORING POWER, 192

¹³ The "September Massacre" may provide an interesting administrative law study in the continued vitality of the rule that the Board may not depart permissibly from precedent without adequate explanation. See, e.g., *Shaws Supermarkets v. N.L.R.B.*, 884 F.2d 34, 37 (1st Cir. 1989) (“[T]he Board may not depart sub silentio from its usual rules of decision to reach a different, unexplained result in a single case.”)

worker choices, considered in aggregate, concerning whether to join and support consistently unions. While “employee free choice” is bandied about as a chief desideratum of labor policy, only rarely are efforts made to understand how workers decide whether to join unions.¹⁴ Rather, distanced policy analysts tend to construct labor law paradigms in a vacuum.¹⁵ Here, by contrast, I wish to engage in a worker-centered reductionist exercise. I want to consider how a practical, discerning worker – a worker in “the original position”¹⁶ – might act upon what I adjudge to be first principles of labor realities. To engage in the discussion, I imagine the situation from the vantage point of an individual worker chosen at random from a group of workers in which the differences between them are unknown and where “everyone is equally rational and similarly situated, [and where] each is convinced by the same arguments.”¹⁷ I taint the process by dictating in advance – based on my personal experience with workers (including myself) – axioms I think a worker could accept as rational.

Let me be forthright – union organizing among workers who do not accept these first principles is very difficult. I have attempted such union organizing personally, and have seldom been more than marginally successful. The first principles must be sufficiently axiomatic to workers for sustainable organizing to proceed. Otherwise, a conventional union organizing message is quickly subsumed in an employer’s counter-framing. In short, original position workers accepting the first principles are “the organizable.”

Even those outside the working class have known the first principles, probably for a long time. In an ancient case, *Vegeahn v. Guntner*,¹⁸ the Massachusetts Supreme Judicial Court upheld an injunction against picketing and patrolling being carried out by workmen outside a Boston factory. The picketing was essentially peaceful, but the workmen were

¹⁴ For a departure from the normal practice see Harvey Krahn and Graham S. Lowe, *Public Attitudes Towards Unions: Some Canadian Evidence*, *Journal of Labor Research*, Volume V., No. 2 (Spring 1984) (focusing on the union joining process by examining what attitudinal, personal, and structural characteristics are associated with latent support for union membership among non-unionists.)

¹⁵ Professor Getman has taken this approach in making, with some colleagues, a serious empirical study of the coercive impact of employer conduct on employees during NLRA representation election campaigns. JULIUS G. GETMAN et al., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976). I sometimes draw conclusions from the findings of his important study that are somewhat different from his conclusions. But I applaud his worker-focused efforts.

¹⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* 139 (1971). I corrupt the process by dictating in advance – based on my personal experiences with workers (including myself) – axioms I intuit a worker could accept as rational.

¹⁷ *Id.*

¹⁸ 167 Mass. 92 (1896)

alleged to have made unlawful threats and to have interfered with contracts and business in a manner deemed unlawful in the 19th century. The Court upheld a very broad injunction. Justice Oliver Wendell Holmes, in dissent, opined that peaceful labor picketing was not unlawful and that the labor injunction was overly broad to the extent it sought to ban peaceful communicative conduct. Holmes' observed,

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.¹⁹

To me, these three sentences represent the quintessential expression of the axioms accepted by original position workers. So integral to original position workers are the axioms that one would rarely overhear discussions among such workers about the propositions. Rather, original position workers would probably limit discussions to inferences to be drawn from the first principles. For example, while original position workers might wonder, in the language of laypersons, about the tactics of a government's utilization of voluntary as opposed to mandatory legal mechanisms to contain labor conflict, they would never doubt the conflict's existence.

My experiences have persuaded me that all workers, including original position workers, have been separated from labor history and blinded by imaginary labor law. I am convinced that original position workers, in particular, would reject quickly any reliance on labor law if they better understood its substantive emptiness, emptiness that they may suspect but are not in a position to apprehend. The falling off of charge filing at the NLRB during the last several years reflects a nearly universal understanding by unions of the emptiness. The best unions - the kind Jack Getman has been writing about - communicate promptly their understanding of this emptiness to employees they seek to organize. Fending off unrealistic expectations is best undertaken early on in organizing drives. Those unions, however, can only organize so many workers in so many industries, and as a result of these limitations most original position workers will not receive clearly enough the message that existing labor law is of limited help. I will not here delve further into the by now well-known substantive ineffectiveness of labor law. For my present purposes, it is enough to say that it has been known for a long time,²⁰ and that the knowledge has

¹⁹ *Id.* at 108

²⁰ See, e.g., Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1788-89 (1983)

irreversibly made its way to street-level union organizing.²¹

My experiences further persuade me that original position workers would be skeptical, with even the barest exposure to history, of solutions to workplace deficiencies grounded in appeals to employer benevolence. Rejection of magical, employer benevolence thinking, following bitter experience, played an important role in leading me, as I am certain it would lead other original position workers, to an ineluctable conclusion. Only vigorous union organizing campaigns will lead to substantial increases in union density and the passion engendered by such campaigns. It is only this passion, in turn, that can produce a labor movement capable of developing and utilizing tumultuous economic weapons. In the end, successful production of tumult is what compels employers to engage in any honest bargaining over terms and conditions of employment. The potential for the creation of tumult is the sine qua non of a bona fide labor law. None of this dynamic is possible, however, without winning over original position workers.

In the remainder of this essay, I first discuss an original position worker prolegomenon, an antecedent understanding of what is necessary to sustain a labor movement, for original position workers. Next, I discuss labor movement²² union organizers as individuals who communicate effortlessly with original position workers. Such organizers carry authentically within them a broad oppositional labor perspective. They are persons who are trusted and respected for their qualities of vision, action, and loyalty.²³ I then discuss the enigma of labor movement workers, who in times past engaged successfully in strategic collective labor activity, seemingly aware of moments of historical import. Labor movement workers have been sleeping for decades.²⁴ No labor movement can exist unless they awaken.

²¹ See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005) (discussing in detail organizing strategies that presume the ineffectiveness of the NLRB and of labor law generally).

²² Adjectival use of the term "labor movement" is meant to describe individuals acting with a purpose inuring to the benefit of the labor movement, broadly conceived, and not limited to a single organizing campaign or labor dispute.

²³ The idea corresponds with Max Weber's theory of charismatic leadership. "The charismatic leader gains and maintains authority solely by proving his strength in life." MAX WEBER, *The Sociology of Charismatic Authority*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 249 (H. H. Gerth & C Wright Mills eds., 1946).

²⁴ I agree in this regard with Professor Estlund's observation in this panel's discussion:

"It takes a movement" for workers to win either union recognition or a decent collective bargaining agreement, not to mention labor law reform, against the powerful and emboldened employer opposition that workers face these days. But the kind of movement that it takes is a rare and difficult feat in an era in which most workers seem to have little taste for battle. Cynthia Estlund, *"It Takes a*

The smash mouth truth is that labor movement workers must vigorously contest the working life to which they have been relegated if they prefer liberty to servitude. For employers - the "masters" in the common law master-servant equation - believe that workers should be content simply to survive during an inexorable race to the bottom of standards and life chances. That is the true meaning of acceptance of new economic realities. I next discuss labor movement organizers and the role that they play in pushing labor movement workers to create worker-centered realities. I conclude that no labor movement is possible without worker courage and consistent embrace of both the inevitability of conflict.

Prolegomenon for Original Position Workers

In the preceding section I claimed that original position workers would reject labor law as a solution to economic insecurity if they knew of its substantive emptiness. But in addition to knowing the present state of the law, original position workers would garner a perspective on the prospect for modifying the law by reviewing the legal history of labor. In my prior experience as a union organizer, the first question I could expect from an original position worker willing to engage in reductionist dialogue with me was, "What do unions have to do with me?" On one level the question, usually raised by workers divorced from labor history, implies that "labor law" obviates the original need for unions. On another level, the question intimates that unions, the moving force, after all, of labor law's creation, may be left out of the very law they fought to create.

Rank and file workers often imagine, without basis, the existence of a natural law of employment that protects them. When I performed public outreach and charge filing assistance duties as an NLRB field attorney, I repeatedly encountered the idea, from inquiring, aggrieved workers, of an all-encompassing legal protection from workplace injustice. I was required to explain the employment-at-will doctrine and to fence with workers suddenly mad at me for claiming that such a doctrine existed in a civilized, post-modern society. The belief in broad legal protection in the workplace is of obscure origin, but as an organizer I found it an obstacle to organizing: workers believing they have legal protections are less likely to think they need a union. In contrast, hard-core original position workers would tend to greet the idea of default legal protection with skepticism, and this intuitive disbelief is essential to their tactical presuppositions.

As an organizer I was often surprised to discover that rank-and-file workers thought they would be treated fairly by their employers because

Movement"—But what does it take to mobilize the workers (in the U.S. and China)? (last page of the draft for this issue that she sent me on 5/9/11).

they assumed employers had generally been fair in the past. Those kinds of workers appeared to hear the echoes of the welfare capitalism of an earlier era. In *The Rise and Decline of Welfare Capitalism*, historian David Brody shows that in the late 1920s certain employers believed in benevolent welfare capitalism.²⁵ To prove his point, Brody quotes Charles M. Schwab of Bethlehem Steel,

Our job is primarily to make steel . . . but it is being made under a system which must be justified. If . . . this system does not enable men to live on an increasingly higher plane, if it does not allow them to fulfill their desires and satisfy their reasonable wants, then it is natural that the system itself should fail.²⁶

This pre-New Deal utterance by a captain of industry might seem surprising. But the statement was made during a time - the 1920s - in which "concord and plenty seemed within easy reach."²⁷ By the early 1930s, however, this optimistic view was tempered by "a burst of unexampled industrial strife."²⁸ Most original position workers would assume that employers are more likely to undertake "socially responsible" positions when it is easiest to do so. As an organizer, I did not attempt to argue that benevolent employers did not exist. Original position workers knew that could not be true. Rather, I argued that voluntary measures would evaporate the moment the employer's "bottom line" was impacted, and continued to remind workers of the extent to which some employers, at least, had interfered with workers' rights. Following this kind of exposition, the ensuing questions became, "which type of employer do you have," and "how do you know?"

Original position workers, once aware of traditional policy justifications for labor law, would likely modify their assessment of current labor dynamics. The stated purpose of the NLRA is "to eliminate the causes of certain substantial obstructions to the free flow of commerce . . ."²⁹ The law's protection of workers is explicitly instrumental. Workers' rights are subordinate to a larger stated policy of commercial stability. To a legal

²⁵ DAVID BRODY, *The Rise and Decline of Welfare Capitalism in WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE*, 48-81 (2d ed., 1993)

²⁶ *Id.* at 48, quoting *Law and Labor* 10 (January 1928): 19.

²⁷ *Id.* at 49. The proposition must be qualified carefully by occupation, industry, and geographic region. Julia Wrigley, for example, has shown that throughout the 1920s superintendents of the Chicago Schools relentlessly exercised authority over teachers in a manner demonstrating they had little concern about perceptions of benevolence. JULIA WRIGLEY, *CLASS POLITICS & PUBLIC SCHOOLS* 153-199 (1982).

²⁸ *Id.*

²⁹ National Labor Relations Act, as amended, 29 U.S.C. § 151.

academic this may not seem particularly startling. But as a young union organizer, I found myself surprised when I first grasped the reality of the subordination. Later legal study led me to understand that complex statutes are always admixtures of interests that are frequently in tension. A commercial rationale was perhaps unavoidable if the statute was ever to survive constitutional attack.³⁰ But an original position worker would be influenced by the knowledge that labor law has always been subordinate to commercial policies. Any worker grasping the subordination would intuit that workers have limited influence over policy within a legalistic system viewing them solely as a means to a commercial end. In a battle of these competing policies it is not difficult to predict which policy will prevail, regardless the doctrine employed to achieve the outcome.

A labor statute explicitly linked to prevention of strikes, or other forms of industrial strife, where no industrial strife is at hand, is a strange, vulnerable creature in such a dubious terrain of worker protection. In the absence of destabilizing industrial strife an original position worker might well wonder how maintenance of present law in light of the seeming absence of the original statutory antecedents and premises can be justified. The worker would wonder in an entirely practical manner: why risk affiliating with unions if they are no more than a manifestation of poorly justified, archaic, now-irrelevant labor law? Eventually, the broader legal system may have no interest in protecting union activity (me) if industrial peace, the stated objective of American labor law, has been achieved. A union supporter in this environment may already have been relegated in the eyes of the legal system to nothing more than a troublemaker or malcontent, subject to harassment bereft of remedy.

The foregoing meditations may sound too academic to have been engaged in by workers possessing limited formal education. It might be suspected that passage of time has corrupted my memory by imbuing it with later-acquired knowledge and experience. But I assure the reader that they are quite representative of actual conversations in which I participated as a unionized employee-organizer in the airline industry in historically labor-tumultuous Philadelphia.³¹ Like the cigar makers of Samuel Gompers'

³⁰ N.L.R.B. v. Jones & Laughlin Steel, 301 U.S. 1 (1937). I agree, however, with the view that the decision to ground the NLRA in Congress's authority under the Commerce clause, rather than under a potentially more expansive 13th Amendment theory, is subject to serious criticism. See Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L. J. 651, 667 (2004); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 81-82 (2002).

³¹ Philadelphia has been a center of worker activism since at least 1835, when it was the scene of a general strike to limit the workday to ten hours. CITE

time,³² airline ramp workers discussed regularly meta-narratives.³³

The workers' conversations implicated large questions of the continuing relevance of unions. Such discussions were, moreover, often linked to an even broader historical narrative describing a societal life cycle culminating in the (natural) death of unions. That narrative commenced with an account of a misty past in which Congress enthusiastically enacted a progressive labor law for the benefit of workers. Although employers ideologically (and understandably, as the story goes) opposed the NLRA, they nobly complied with the law until achieving sufficient political support to eviscerate it, lawfully, through passage of the Taft-Hartley Act.³⁴ After Taft-Hartley, labor law was eventually rendered irrelevant, either by the triumph of the American economy, or as a result of court hostility and administrative agency capture.³⁵

The meta-narrative of the "natural" erosion and obsolescence of unions – largely accepted by even original position workers – suffers from serious and well known deficiencies, and it is the perpetual challenge of organizers to identify and discuss them. First, the NLRA has been only marginally protective of workers and their unions.³⁶ Even where the statute is meant explicitly to improve workers' bargaining power,³⁷ the nominally co-equal policy has always yielded to elite judgments of what is in the interests of

³² See HAROLD C. LIVESAY, *SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA* (1978)

³³ For an extended discussion of the union organizing culture of airline ramp workers see LIESL MILLER ORENIC, *ON THE GROUND: LABOR STRUGGLE IN THE AMERICAN AIRLINE INDUSTRY* (2009)

³⁴ A 1947 amendment of the NLRA is customarily described as bringing the United States Government from a position of union sponsorship to one of labor relations neutrality. See, e.g., ARCHIBALD COX, DEREK CURTIS BOK et al., *LABOR LAW: CASES AND MATERIALS* 84 (14th ed., 2006)

³⁵ Many workers I encountered would have been fully in agreement with my understanding of the view of William Forbath – namely, that the judiciary played, at several historical turns, a major part in crippling even the labor rights begrudgingly conferred by Congress. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

³⁶ Weiler, *Promises to Keep*, *supra*. n.19

³⁷ National Labor Relations Act 29 U.S.C. § 151:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and effects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

commercial stability.³⁸ Or, perhaps more precisely, the policy has yielded to other ideas of commercial stability having less to do with depressed wages and reduced consumer purchasing power, commercial injuries at which the statute was explicitly aiming.³⁹

Moreover, even if the statute had offered a greater range of formal protection of labor activity, in particular meaningful remedies, it is quite unlikely that the law would have been enforced. Indeed, many employers never accepted gracefully the NLRA, even in the shamefully weak form in which it emerged, or acquiesced one whit to the barest notions of union legitimacy.⁴⁰ While employer resistance to the NLRA, prior to the Court's declaration of its constitutionality, is widely known, the degree of resistance is not always fully appreciated. Original position workers evaluating the arguments of labor movement advocates in support of the need for direct economic action would no doubt be influenced by the smash mouth reality that coexisted with the imagined "golden age" of labor law.

The smash mouth opposition of employers to unionization during the New Deal is illustrated in the 1937 report of the Committee on Education and Labor, Subcommittee Investigating Violations of Free Speech and the Rights of Labor, popularly known as the LaFollette Civil Liberties Committee, named after its chair, Senator Robert M. LaFollette of Wisconsin. The Committee found that employers had prepared to meet the "union threat" with more than just reasoned persuasion.⁴¹ Throughout the 1930s, several major American corporations had collectively spent nine and

³⁸ Senator Wagner decided to rely on Congress's commerce power as a constitutional justification of the National Labor Relations Act to escape criticism from middle-class reformers and judges. This was seemingly the beginning of the felt need to justify all NLRB action through appeals to social peace and the prevention of commerce disruption rather than honestly balancing expedient pacification against the labor freedom that was also an important component of the architects' original vision. For a convincing exposition of this view see James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 524 (2004).

³⁹ See *supra*. n.37

⁴⁰ I find "new governance" discussions unsettling in the context of labor law. I think, following commentators like James A. Gross, that the NLRB was so quickly emasculated by a conservative counterinsurgency that it is difficult to speak of vigorous "old governance" needing to be superseded. See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947* (1982). Professor Lobel has recounted arguments that a gap between law-on-the-books and law-in-action is, in reality, a sign of strength in a regulatory system. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 451 (2004). The labor law on the books is sufficiently weak, however, to render the question peculiarly academic.

⁴¹ MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY*, 262-64 (7th ed., 2004) [hereinafter DUBOFSKY & DULLES, *LABOR IN AMERICA*]

a half million dollars for labor spies, strikebreakers, and munitions.⁴² General Motors' expenditure in this regard of \$830,000⁴³ in the period 1933-36⁴⁴ strongly suggests that the company intended confrontation with paramilitary and not just economic weapons. These revelations place the GM sit down strikes of 1937 in an entirely different light. During that landmark conflict, striking workers were at risk of suffering physical injury at the hands of law enforcement officials and the National Guard.⁴⁵ But, as LaFollette's committee appeared to demonstrate, the strikers were additionally vulnerable to direct, violent corporate intervention. Workers engaging in the strikes accordingly displayed great courage in the throes of tumult and smash mouth opposition.

Few imagine, of course, that the New Deal was not fraught with fits and starts of policy implementation, or believe that innovative approaches to large social problems would not occasion opposition.⁴⁶ But opposition to the point of arms is sharply at odds with notions of eventual dignified resignation by employers to the spirit of history and the rule of law. The picture that emerges is one of opposition to unionization teetering on the edge of warfare during a historical period of supposed unparalleled support for unions. Against this picture, the story of the natural erosion and obsolescence of unions appears quite infirm.

An original position worker might contend that, acknowledging

⁴² *Id.* It is interesting to match the names of these armed employers, which came to light during the investigation of the 1937 "Little Steel" strike, with some of the more notable labor law court cases of the era:

The Youngstown Sheet and Tube Company had on hand eight machine guns, 369 rifles, 190 shotguns, and 450 revolvers, with 6,000 rounds of ball ammunition and 3,950 rounds of shot ammunition, and also 109 gas guns with over 3,000 rounds of gas ammunition. The Republic Steel Corporation had comparable equipment, and with the purchases of tear and sickening gas amounting to \$79,000, was described as the largest buyer of such supplies - not excepting law enforcement bodies - in the United States. LaFollette declared that the arsenals of these two steel companies "would be adequate equipment for a small war."

Id. at 263

⁴³ The figure is unadjusted for inflation.

⁴⁴ DUBOFSKY & DULLES, LABOR IN AMERICA at 263

⁴⁵ Only the refusal of then Michigan Governor Frank Murphy to call out the National Guard appears to have averted carnage. DUBOFSKY & DULLES, LABOR IN AMERICA at 286-87.

⁴⁶ The immensely complex subject is beyond the scope of this essay, even in outline. For a lively, thorough discussion of the "First New Deal," the "Second New Deal," the "Court Packing Drama," and other discrete New Deal topics see Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L. J. 2165 (1999).

widespread and even violent anti-union opposition since the New Deal, unions ceded the moral high ground they might otherwise have enjoyed by abusing what powers the NLRA initially conferred. For this reason, the contention might continue, subsequent Taft-Hartley and Labor Management and Disclosure Act restrictions were necessary to level the playing field between unions and employers.⁴⁷ But original position workers must consider the timing of the retrenchment and decide for themselves whether it came as a result of actual abuses or was simply the product of reactionary forces subsequently gaining the upper hand.

The retrenchment began as early as 1939, when a Special House Committee to Investigate the NLRB, the “Smith Committee,” named after Virginia representative Howard W. Smith,⁴⁸ was formed in response to alleged activist tendencies of the NLRB in support of newly emerging industrial unions.⁴⁹ A “Smith Bill” resulted from the committee’s deliberations, which was intended to rein in the NLRB’s aggressive enforcement of the NLRA.⁵⁰ The bill passed the House but was not

⁴⁷ As a young, cynical, inadequately educated employee-organizer, I confess that I presumed uncritically that the “abuses” amounted to little more than successful primary strikes backed by extraordinary union solidarity.

⁴⁸ Smith was also the author of the anti-communist “Smith Act,” and was a notorious opponent of civil rights legislation.

⁴⁹ A magazine article from the period captured the sentiment of the time:

In the 18 months before the [Jones and Laughlin Steel] decision, NLRB had been able to hold only 76 plant elections in which workers chose their own unions. In the next 12 months there were 1,142. The rush was on. In the rush, A. F. of L. brother fought C. I. O. brother. To rule between hard-boiled employers and hard-boiled union chiefs, NLRB sent many a radical young theorist, many an idealist who saw everything in black (employers) & white (workers). No Abraham Lincoln was on hand to design a just and tolerant reconstruction. The carpetbaggers swarmed in, and the night riders. NLRB ruled with a high hand and little regard for feelings. Soon businessmen big & little who agreed on nothing else agreed in hatred of NLRB. Congress began to feel the way the wind was setting.

Time Magazine, March 18, 1940 *available at*
<http://www.time.com/time/magazine/article/0,9171,763627-1,00.html#ixzz18avGPc6E>. (last visited May 10, 2011)

⁵⁰ As recent events remind us, the NLRB’s mere enforcement of the NLRA can be seen as aggressive enforcement. Recently, the Boeing Corporation publicly admitted that it was relocating some operations from Washington state to South Carolina reduce the possibility of employees exercising their right to strike under the NLRA. Such an action, even if characterized as a partial closure of operations, appeared a clear violation of the NLRA because. When Acting General Counsel Lafe Solomon had the temerity to issue a complaint alleging such a violation, the tenor of ensuing commentary was that the NLRB’s

successful in the Senate. However, the proposal was an obvious precursor of the Taft-Hartley amendment, calling into question the authenticity of that statute's "remedial" motivation.⁵¹

The retrograde continued in 1941, before the United States' entry into World War II. In the wake of a successful coal strike engineered by John L. Lewis, in direct defiance of the no strike pleas of President Roosevelt, the House of Representatives passed a bill banning strikes in defense industries.⁵² Thus, within a mere six years of first protecting employees' rights to engage in concerted activities,⁵³ Congress had on two occasions embarked on serious adventures to restrict the rights.

Scaling back the right to strike on the precipice of war, however, might be seen as merely an adaptation to extraordinary times and not as a broader retreat from the peacetime labor policy as it stood prior to 1937. Even the nature of that peacetime policy remains open to question, however. Some scholars have made a case for the later corruption of the true, worker-centered intent of the Wagner Act.⁵⁴ Many original position workers have a

pursuit of even the weak remedies of the NLRA was beyond the pale. Dave Jamieson, *Boeing Complaint: Solomon, NLRB Dig In Against Republican Critics*, THE HUFFINGTON POST (May 10, 2011, 11:03 a.m.).

⁵¹ The Bill, among other things, would have:

Created a new NLRB board of three members; created a new Administrator, who would receive complaints, make investigations; allowed the NLRB only judicial functions, with no powers of administration, initiation, prosecution or enforcement; allowed the NLRB to apply for Court enforcement of its rulings only through the Administrator; denied the NLRB the right to enter disputes between union units in a plant except on an employers' application, or 20% of the workers in a proposed bargaining unit; stripped from the Act the statement that it is the policy of the U. S. to encourage the practice & procedure of collective bargaining; granted employers the right to propagandize their workers or the public; limited to six months the period for which the Board may order back pay to reinstated workers. *See supra. n. 49*

⁵² DUBOFSKY & DULLES, *LABOR IN AMERICA* at 310. The measure, which was passed on December 3, 1941, never reached the Senate because the attack at Pearl Harbor intervened four days later.

⁵³ The Norris LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1988), had articulated the right as policy in 1932, but in oddly negative terms. Federal courts were not authorized to interfere with peaceful labor activity, including strikes. While the statute announced a "policy" in favor of peaceful concerted activity, affirmative protection was only vaguely afforded. Nevertheless, it was clear to all involved that the Government had taken on a protective posture in connection with such activity. *See* Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, 674-77 (2009).

⁵⁴ Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223, 229 (2005) ("NLRA policies matter . . . [because] . . . they say that

surprisingly good, even intuitive grasp of the potential for the erosion of law through politico-legal processes such as “capture”⁵⁵ and “nullification” and would thus be receptive to theories of corruption and cooption.⁵⁶ During my blue-collar days I would not have been able to throw a rock without hitting a rank-and-file worker who could have alleged, in surprisingly vivid and defensible terms, how federal agencies had been “bought off” and how courts had refused to apply clear law. Depending on various factors including, in my experience, geographic locale,⁵⁷ workers may accept such accounts of labor law failure much more readily than triumphal narratives of conflict-free, worker rejection of unions premised on the evident success of a laissez faire economy.⁵⁸ Unqualified triumphal narratives are not likely to resonate with workers whose families have struggled across generations just to survive; they similarly gained little traction with my co-workers on the airline ramp who lived through the underbelly of the Reagan era. A gut level rejection of triumphalism is not explanatory, however. How does one explain, to an original position worker, what went wrong with labor law?

One explanation is that the NLRA was never meant to succeed. It is certainly true that employers played a role in framing the statute for the general public as evidence of a governmental plot to impoverish capital and

work and the way workers are treated is central to determining the sort of country the United States will be [and because] [t]hey provide the tools so workplaces can operate on principles consistent with those of a democratic country”)

⁵⁵ By “capture” I mean instances in which an administrative agency fails to an impermissible degree to implement the law it has been entrusted to execute for transparently political reasons.

⁵⁶ By “nullification” I mean instances in which courts interfere in an illegitimate manner with an administrative agency’s efforts to execute a statute within the agency’s mandate.

⁵⁷ I am thinking anecdotally of cities with which I am very familiar like Philadelphia and Pittsburgh. The spillover effect of regional labor union attitudes has been inadequately researched. See Caleb Southworth and Judith Stepan-Norris, *American Trade Unions and Data Limitations: A New Agenda for Labor Studies*, 35 ANNUAL REVIEW OF SOCIOLOGY 297, 307 (2009) available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-070308-120019> (Despite substantial literature that shows state and city-level variation in politics, employment, religion, and labor force composition, little research on unions takes geography into account).

⁵⁸ I recall discussions with my classmates at Harvard when Professor Paul Weiler was teaching the *Electromation* case. The case raised the question of whether employer “quality circles” were unlawfully dominated labor organizations within the meaning of the NLRA. An important background policy issue was whether the ultimate finding that an employer’s “direct dealing” with employees concerning terms and conditions of employment presumed a conflict model of labor-management relations that was anachronistic. As a union steward who had been involved in physical altercations during recent organizing drives, I found serious entertainment of the question ludicrous.

as some terrible end of history.⁵⁹ Such framing probably eroded popular support over time. That motif draws on a theme of corruption of originally pristine congressional motives. As Professor Karl Klare has demonstrated, however, congressional “intent” in enacting the NLRA may have amounted to an exercise in short term political expediency rather than a principled exercise in policy formulation:

[M]any Senators, convinced that the bill was unconstitutional, shifted the onus of its defeat to the Supreme Court. . . . [T]hey felt certain that the measure would not take effect since employers would withhold compliance until the Court declared it void.⁶⁰

For those senators who anticipated from the beginning the NLRA's evisceration the only thing that may have “gone wrong” with the statute was that it took so long to undermine. I have little doubt of the originally strong popular support for the NLRA.⁶¹ I do seriously question, however, the existence of broad-based elite support for the statute by more than a handful of the then-existing “establishment.” One need not doubt the sympathies of the law's architects to also accept that other elites were simply waiting out a wave of short-term popular favor.

The historical currents that I have been underscoring might lead an original position worker to accept my view that labor law was, from labor's perspective, weak and problematic, from its inception. From this point of acceptance it is quite easy to agree with Professor Getman's conclusion that workers and their unions will determine the labor movement's future, and not law, for that is the true lesson of history.⁶² In light of the inherent structural weakness of labor law, the original position worker may be drawn to the conclusion I draw. Labor's survival through the last seven decades has resulted from both its actual exertion of economic strength and from society's fear that it would attempt such exertion.

It might also follow for that worker, as it does for me, that legal reform of the NLRA, while helpful in the short term, is not adequate to ensure the self-organization of workers. As Professor Getman explains, employers remain free under proposed reforms to engage in delaying tactics that would

⁵⁹ DUBOFSKY & DULLES, *LABOR IN AMERICA* at 261.

⁶⁰ Karl E. Klare, *The Crisis of Collective Bargaining Law*, 44 MD. L. REV. 731, 775 (1985) quoting I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 116 (1950).

⁶¹ DUBOFSKY & DULLES, *LABOR IN AMERICA* at 261

⁶² GETMAN, *RESTORING POWER* 307 (“Unions throughout history have been able to organize and strike successfully, even in the face of repressive laws, as long as they have had the determination and willingness to take chances.”)

sound the death knell of traditional organizing campaigns.⁶³ A labor movement built on a reliance on statutory tinkering seems contrary to history. The labor movement was created not by statutes, but by workers and their unions. In many respects, Samuel Gompers was right.⁶⁴ Still, for me it would go too far to assert that law has played no positive role on the ground in labor relations. At a minimum law signals society's views respecting labor's legitimacy. Following enactment of the Norris-LaGuardia Act in 1932 and Section 7(a) of the National Industrial Recovery Act in 1933, for example, a burst of organizing involving millions of workers commenced; the activity could not be ascribed to positive legal protection of unions.⁶⁵ That protection would not come until the passage of the NLRA in 1935.⁶⁶ Workers, nevertheless, received the message, real or imagined, that belonging to a union was legitimate, and even desirable.⁶⁷

In the wake of extended arguments of the type I have advanced above, workers may reject theories of legal determinism and employer benevolence as solutions to the problems acknowledged in the original position. But intellectual acceptance of the arguments merely sets the stage for organizing. The intellect reveals the smash mouth truth, but it cannot supply the courage required to follow through with the implications of a new paradigm. Leadership and motivation are the domains of labor movement organizers.⁶⁸

Labor Movement Organizers

Labor movement organizers require original position workers to

⁶³ Id. 261-67

⁶⁴ Gompers argued that "the trade union was the only working class institution in American society . . . and [h]e wanted the government to do as little as possible because he distrusted it so intensely." Irwin Yellowitz, *Samuel Gompers: A Half Century in Labor's Front Rank*, 112 MONTHLY LAB. REV. 27, 30-31 (1989)

⁶⁵ The Norris-LaGuardia Act forbade the federal courts from issuing injunctions to stop peaceful labor activity but created no private right of action for workers alleging employer interference with such activity. Section 7(a) of the NRA was administered by a series of administrative boards lacking authority to petition courts to compel employers not to interfere with the organizational rights nominally created by the NRA.

⁶⁶ See DUBOFSKY & DULLES, *LABOR IN AMERICA* at 252-53.

⁶⁷ According to Kirstin Downey, the American Federation of Full Fashioned Hosiery Workers union posted signs from the period in reaction to NIRA Section 7(a), still extant in the National Archives, reading, "President Roosevelt Has Endorsed—Congress Has Passed These Workers Rights . . . Join the Union and Insist on Your Rights in This Bill." KIRSTIN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE AND LEGACY OF FRANCES PERKINS* 207-208 (2009).

⁶⁸ On the power of charismatic leadership see MAX WEBER: ON CHARISMA AND INSTITUTION BUILDING (Ed., S.N. Eisenstadt, The University of Chicago Press, 1968); see also FROM MAX WEBER, *supra*. n.23

develop the critical mass necessary to transform workplaces. Professor Getman's exposition in *Restoring the Power of Unions* provides a glimpse of the essence of these organizers. In organizing discrete workplaces they do not operate in microcosm. Like the CIO organizers of old,⁶⁹ they press implicitly a broader social-democratic vision, even if they are not always clear on the best organizational tactics to employ in achieving it.⁷⁰ They understand the need to organize entire communities, if necessary, to achieve workplace objectives.

Labor movement organizers communicate a visceral apprehension of the deeply oppositional character of labor relations and instinctually look askance at attempts to downplay conflict. This is important, for in my experience management seldom fails to understand the fundamental nature of the conflict entailed whenever workers challenge managerial hegemony. Commentators have noted the distinctive intensity of American business to maintain managerial control at all costs.⁷¹ Original position workers apprehend intuitively the essential, unavoidable reality of conflict in any dispute between workers and managers over control of the workplace. Indeed, that perspective is largely what defines the original position.⁷² Organizers appearing to gloss this reality can quickly lose credibility with an original position work group.

Professor Getman's organizer-protagonists are authentic. Workers follow them because they know the organizers are "bitter-enders" who will zealously pursue workers' objectives. A labor movement organizer's indispensable credibility is purchased dearly and often derives from the organizer's formative life experiences. This credibility permits the organizer to continue to lead even when there are differences of opinion on tactics.

Consider my oppositional pedigree, which is an accident of birth. My mother, a coal miner's daughter, tells the following story.⁷³ Her father worked in a coal mine in Harlan County, Kentucky, during the 1930s. When he and his coworkers sought representation by the United Mine

⁶⁹ See ROBERT H. ZEIGER, *THE CIO, 1935-1955*, 1 (1995)

⁷⁰ I am not entering into the hagiographic. The CIO, for all its legendary prowess and militancy, was largely at the mercy of social forces entirely beyond its control reacting to the hostility of "bitter-end" employers. *Id.* at 2. I am speaking of the *passion* of the CIO, an emotion that is a necessary though not sufficient condition for a labor movement.

⁷¹ Karl E. Klare, *The Crisis of Collective Bargaining Law*, 44 MD. L. REV. 731, 778 (1985)

⁷² See *supra* n.19 and accompanying text.

⁷³ Betty Parker Duff, *Stand by Your Man: Gender and Class Formation in the Harlan County Coalfields*, in *BEYOND HILL AND HOLLOW: ORIGINAL READINGS IN APPALACHIAN WOMEN'S STUDIES* 152, 165 (Elizabeth Sanders Delwiche Engelhardt ed., 2005)

Workers,⁷⁴ the mine operators reacted violently, intimidating and coercing union sympathizers on a daily basis. When my grandfather left his house in the morning for the mining camp, company operatives of the “Lynch mine” shot at him from behind trees. My grandmother became accustomed to living in a war zone.⁷⁵ In daily anticipation of the morning sniping, she and my grandfather would tip a large kitchen cook table over onto its side. Behind this table, my grandmother and her seven children – including my mother – would crouch. The table served as cover from the ricocheting bullets that penetrated the kitchen walls as my grandfather fled the house and headed for a nearby protective tree-line. He hugged his way from tree to tree, slowly, perilously heading toward his mining camp. I knew this story by heart by the time I was eleven years old.⁷⁶

Accordingly, I probably do not need to explain further why I am skeptical of the idea of benevolent employers.⁷⁷ The seeds of my bias were sown well before I learned about the railroad strikes of 1877; the Haymarket Riot of 1886; Homestead; the Ludlow Massacre; and on and on. When I learned more history, and connected it with family experiences – all establishing employers’ willingness to shoot at workers – I was on the road to becoming the kind of organizer I am describing: one aspiring to be like Professor Getman’s protagonists. My family history posed a simple organizational question that proved useful in discussions with original position workers: if it does not matter whether workers select a union – the typical employer claim – why then have employers been shooting at them? Much energy has been expended to oppose that which does not matter.

Many labor movement organizers are convinced employers have lied to

⁷⁴ Although the time line is not entirely clear to me, based as it is on oral history, I suspect that the activity transpired between 1931 and 1933 during UMW organizing of previously non-union coalfields in Kentucky and Alabama. See DUBOFSKY & DULLES, *LABOR IN AMERICA* at 253.

⁷⁵ Duff, *Stand By Your Man* at 165.

⁷⁶ This is obviously a limited and one-sided account of labor-management conflict in the coalfields. For a much more informed and thorough exposition of power relations in the coalfields during the 1930s, even if one sharing my bias, see JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESSENCE AND REBELLION IN AN APPALACHIAN VALLEY*, 84-121 (1980).

⁷⁷ From the beginning, I was thrust *in loco Yossarian*:

“They’re trying to kill me,” Yossarian told him calmly.

“No one’s trying to kill you,” Clevinger cried.

“Then why are they shooting at me?” Yossarian asked.

“They’re shooting at everyone,” Clevinger answered.

“They’re trying to kill everyone.”

“And what difference does that make?”

them at one time or another. Experience of employer dissembling seems a right of passage for committed organizers. In the early 1980s, I was a young ramp serviceman working for the now-defunct, Philadelphia-based Altair Airlines. At the time, Altair found itself on the wrong side of a competitive battle with Allegheny Airlines (now U.S. Airways), in the brave new world of airline deregulation and filed for bankruptcy. Many companies experienced similar fates in the bankruptcy-rich period of 1980 to 1984. Just prior to the Altair filing, one of the company's high-ranking executives hopped up in the cargo belly of a Fokker F-28 passenger jet, startling my perspiring co-workers and I. He wore a white dress shirt with the sleeves rolled up. It appeared he was trying to demonstrate his "solidarity" with us. He was a very bad loader. Though he could not lift much, he could talk quite a lot. I asked him the question on everyone's mind about our employer – "Are we going to be ok?" Looking me in the eye, he responded without hesitation, "Everything will be fine." Two days later, the expiring airline towed its planes to a storage hanger. Maybe the executive did not know of the impending filing, but I believe he did. He had his reasons for lying. In his world, reasons for concealing facts important to a worker's next meal will probably always trump reasons for the worker needing to know about a layoff six weeks before Christmas. I carry that story in my heart.⁷⁸ Labor movement organizers carry such stories and original position workers sense the existence of the stories without knowing their details. The essence of a labor movement organizer is refusal, based on bitter experience—often personal, to view any labor conflict as insignificant.

Labor Movement Workers

A worker in the original position, effectively led by a labor movement organizer, is ultimately faced with the decision of whether to *be* a labor movement worker in some high-stakes situation. The power of unions will never be restored without the basic courage of such a worker to create tumult in the workplace when necessary. I think of this as a "Middletown question."

Middletown, a book published by Robert and Helen Lynd in 1929,⁷⁹

⁷⁸ The Colket family, founders of the Campbell Soup Company, owned Altair. Altair's 39-year old president, Henry P. Hill, opined publicly that most of the company's stranded 652 employees "will never work in aviation again." Tom Belden, *Altair Suspends its Flights – Phila. Airline Files for Bankruptcy*, *Phila. Inquirer*, Nov. 10, 1982, at A1 (copy on file with author). This opinion turned out to be inaccurate. Most Altair employees, including me, worked again in aviation, many with U.S. Air in Philadelphia.

⁷⁹ HELEN MERRELL LYND AND ROBERT STAUGHTON LYND, *MIDDLETOWN: A STUDY IN AMERICAN CULTURE* (1929)

analyzed the social structure of middle-sized, middle-class Muncie, Indiana. The anthropological treatment of a middle-class, largely white⁸⁰ American town was revolutionary for its time. One of the more interesting findings from the study was that workers had an extremely negative outlook on the future, and yet had little apparent inclination to change it. The attitude was characterized as follows in Dubofsky & Dulles' *Labor in America*:

Yet not a hint of class consciousness or rebelliousness stirred among Muncie's workers. However much their lives and behavior differed from those of the business class, local workers shared similar values and drives and measured success mostly in terms of money; they thought that the promise of wealth was open to all and valued education for its income producing potential.⁸¹

However, the workers seemed to hold those views while, at the same time, "expect[ing] advancing age to rob them of work and wages, and fe[eling] themselves powerless to shape their communities and futures."⁸²

I experienced similar attitudes when attempting to organize workers at U.S. Air in a union election campaigns during the 1980s. Workers, particularly in former Piedmont Airlines cities,⁸³ consistently expressed a gloomy outlook for the future, but declined to sign union authorization cards. The rationale for not signing was pragmatic. Despite their low wage structure relative to U.S. Air workers in major cities, the Piedmont workers were simply grateful to have a job and to "own" a car and house, even if their credit-financed ownership left them perpetually vulnerable to economic downturns. The Piedmont workers also attached little or no significance to the fact that, in the absence of a union contract, their employment was "at will." The workers were simply not in the original position.

For a time, I was despondent at the dearth of workers I encountered lacking my grandfather's courage, courage absolutely necessary for the creation and sustaining of a labor movement. A subsequent personal work experience at U.S. Air restored some of my hope. Sometime in the mid-1980s, U.S. Air and my union, Local 732 of the International Brotherhood of Teamsters, agreed to a two-tiered wage structure for fleet service workers – an "A" scale and a "B" scale. The agreement came during significant U.S. Air expansion in Philadelphia. The number of fleet service workers

⁸⁰ For an account of the African-American experience in Muncie during the same period *see* THE OTHER SIDE OF MIDDLETOWN (Luke Eric Lassiter et al. eds., 2004)

⁸¹ DUBOFSKY & DULLES, LABOR IN AMERICA at 229.

⁸² *Id.*

⁸³ U.S. Air and Piedmont, an airline based in the south, announced in 1987 an intention to merge. The merger was finalized in 1989.

doubled in less than a year. I was hired in 1986 at the starting B scale rate of \$6.36 per hour. Newly hired, junior “B-scalers” worked side-by-side with senior “A-scalers,” often earning \$10 per hour below the A-scale rate. Harmonious working relations between the two groups were difficult to achieve in these circumstances. The B-scalers became deeply resentful of their second-class wage status within the fleet service group.

A B-scaler named George Nestor emerged as unofficial leader of the junior group. Nestor, a big, fast, strong competitive kick boxer, was physically and psychically fearless. He was also a natural leader who inspired confidence in others (and in me). One example of his ability to inspire was especially striking. B-scalers had arranged to have a large number of “protest” buttons made. The buttons bore the message, “stop the B/S Ed.”⁸⁴ One night, a roundly disliked supervisor ordered me to remove one of the protest buttons from my uniform shirt. I refused, gambling that the supervisor did not have actual discharge authority, a suspicion that was vindicated. The supervisor then ordered me to the office of the airline's station manager, the highest-ranking airline official in an airport.⁸⁵ The station manager instructed me, on pain of discharge, to remove the button. I complied. The (A-scale) shop steward, present at the meeting, said nothing. I was ashamed. Nestor greeted me as I was leaving the manager's office. With a defiant look in his eye, he lifted me into the air, in the presence of the manager. He said, “I love you brother.” He meant it.

On another night, not long thereafter, U.S. Air discharged Nestor, allegedly because he attacked a supervisor. B-scalers demanded to see the body: an actual attack by Nestor would lead to death or grievous bodily injury. We were not long in smelling the rat, without the slightest hesitation, or coordination, hundreds of fleet service agents walked off the job, leaving several unloaded aircraft stranded at their gates. As a newly appointed shop steward, I had no idea what to do. I made some vain attempt at instructing everyone to go back to work. My co-workers smiled, as if to say, “we know you have to do this, but please get out of our way, kid, before you get hurt.” In the end, no one could bear the thought of remaining silent in the face of Nestor's discharge. We had families, bills, and obligations. But for us, some things could not be tolerated. In the end, no one was fired for the action, for the solidarity of the group had been established, and discipline would, without doubt, have been met with further worker action – a threat that always seems to be more credible in

⁸⁴ Referring to Edward Colodny, then CEO of U.S. Air, and requesting cessation of the B-scale as a form of bull excrement.

⁸⁵ Supervisory authority cases have always been excruciating for me to plod through because, in the real world workplace, *everyone* knows who the actual wielders of authority are.

Philadelphia than in many other places.

The dramatic actions of the B-scalers had the long-term effect of galvanizing the entire ramp group, A-scalers included. The union subsequently lost a nationwide representation election ordered by the National Mediation Board,⁸⁶ after another in the seemingly endless round of airline mergers during the period.⁸⁷ When a smiling upper management cohort in unprecedented fashion strolled through the ramp "ready" room, a matter of moments after news of the election loss had migrated through the airline's terminal, all thoughts of "A" and "B" scale were forgotten, workers were as one in our contempt for that management group. Following the intense decertification of the Teamsters Union, made possible we all knew by our company's merger with a southern company, Philadelphia ramp agents, never really accepting the outcome, continued to engage unpredictably in concerted activity. On one occasion, for example, I drafted a petition protesting the requirement that workers drive open vehicles through clouds of construction related cement dust. On another occasion, we wore red shoelaces to protest the company's increasingly strict uniform policy. One rainy, cold, winter's evening, the air conditioning system turned on in the ready room. No one said a word. No one thought it was a malfunction. Nothing could have brought us closer together.

Professor Getman has written eloquently about the struggles of paper workers during the infamous strike against International Paper in Jay, Maine.⁸⁸ During my time as an associate with a Maine law firm,⁸⁹ I had the privilege of meeting and representing some of those same workers as part of the firm's workers' compensation practice. I was impressed not only by the obvious courage of the workers, but also by their resolute understanding

⁸⁶ There were actually multiple elections. For a record of the tumultuous proceedings, and the final order of decertification, *see* International Brotherhood of Teamsters and USAir, Inc., 18 NMB 290 (1991)

⁸⁷ In the late 1980s, U.S. Air merged with Piedmont and Pacific Southwest Airlines. Prior to that, however, the company had been about the business of assembling a motley collection of commuter operations. The organizing dynamic from the union's perspective was always simple: including large numbers of quasi-rural workers in the unit resulted in union losses. Subsequent to my departure for law school in 1992, the Communication Workers of America (CWA) became the nationwide certified representative of all U.S. Airways "passenger service" workers. When U.S. Airways later merged with America West Airlines, in 2005, workers overwhelmingly selected a joint CWA-Teamsters Association to represent the combined bargaining unit of —ratified by the more than 8,000 workers. I like to think that in the late 1980s my union brothers and sisters were fighting a holding action.

⁸⁸ JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS AND PERMANENT REPLACEMENTS* (1999)

⁸⁹ I was employed by the Topsham-based firm of McTeague, Higbee, MacAdam et al. from 1995-1997.

and acceptance of original position axioms. I realized throughout my dealings with them that their battles had transpired during the same historical window as the battles I had been waging with my co-workers at U.S. Air. A kid from Philadelphia and paper workers from the woods of Maine had a surprising amount in common. We had been labor movement workers and, despite our respective setbacks, we knew that an effective labor movement grew out of countless workers willing to fight with courage against long odds.

CONCLUSION

I do not depart from the path of the law when I speak of original position workers embracing the inevitability of conflict, of labor movement organizers possessing an unshakable oppositional ethic, or of labor movement workers willing to fight courageously for labor rights. On the contrary, I am speaking of a return to the law. One advocates for law by insisting on the reestablishment of the necessary conditions to ensure that the fight between labor and capital can be “carried on in a fair and equal way.”⁹⁰ The need to restore the power of unions follows from the realization that “nothing endures but change.”⁹¹ The question is whether change, and the conflict it produces, will be managed according to rules agreed upon in advance by the broader society – by the rule of law. Conflict will come because workers – in the end – have no choice but to defend themselves.⁹² The law will then – again – have to decide whether short-term, commercial gain justifies attempted annihilation of the labor movement. If the law answers in the affirmative, it embarks on a fool’s errand. Only one who has not walked where I have walked could accept the magical thinking that the labor movement will somehow disappear.

⁹⁰ Vegelahn at 108 (Holmes, J, dissenting)

⁹¹ A statement attributed traditionally to the ancient Greek philosopher Heraclitus of Ephesus.

⁹² See n.1 Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience* at 807 (arguing that a seeming lack of conflict may simply reflect that workers are not yet sufficiently organized to strike and that workplace hostility and antagonism may manifest themselves in ways not immediately associated with “conflict.”)